

*R. M. Campbell*

*261*

## TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [REDACTED] 1924

No. [REDACTED] 220 *70*

FORT SMITH LIGHT & TRACTION COMPANY, PLAINTIFF  
IN ERROR,

vs.

FAGAN BOURLAND, M. J. MILLER, AND M. F. SMITH,  
CITY COMMISSIONERS OF THE CITY OF FORT SMITH,  
ARKANSAS

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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FILED NOVEMBER 12, 1923

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[fol. 1]

IN THE

**SUPREME COURT OF ARKANSAS**

No. 7998

**FORT SMITH LIGHT & TRACTION COMPANY, Appellant,**  
**vs.**

**FAGAN BOURLAND, M. J. MILLER, and M. F. SMITH, City Commis-**  
**sioners of the City of Fort Smith, Arkansas, Appellees**

**STIPULATION FOR TRANSCRIPT OF RECORD AND ABSTRACT OF EVI-**  
**DENCE**

It is stipulated that the record herein consists of the following:

- (1) The Complaint.
  - (2) The response of the defendants.
  - (3) The judgment of the Circuit Court.
  - (4) The motion for a new trial.
  - (5) The order over-ruling motion for a new trial.
  - (6) The proceeding, findings and opinion of the Supreme Court, including order setting cause for oral argument on October 5, 1923, on the motion for rehearing.
- It is admitted that the suit was brought within apt time and in proper form under Section 19 of Act 124 of 1921 to review the action of the City Commission, and that the appeal from the action of the Circuit Court in affirming the action of the City Commission was taken in proper time and manner, as prescribed in Section 21 of Act 124 for consideration before the Supreme Court.
- (7) The evidence before the Supreme Court established these facts:

The Appellant, hereinafter called the Company, operated under franchises granted by the City of Fort Smith until 1919, when under the terms of Act 571 of the General Assembly of 1919, it surrendered its franchises and received an Indeterminate Permit, as provided by Section 15 of said Act; said Act 571 of 1919 was amended by Act 124 of 1921, which authorized the reinstatement of franchises at the option of the public utility, but the Company did not avail itself of said Act, but continued to hold and operate under its Indeterminate Permit as authorized by said Acts of 1919 and 1921.

[fol. 2] The property of the Company used and useful for street car purposes—using the taxation value as the basis thereof, which is less than the market value was \$934,540.00. Such property depreciates

at the rate of 4.25% per annum. The net earnings of the Company for the year 1922 were \$68,984.99 applicable for depreciation, interest and profit and after deducting said depreciation left a net return of \$16,027.74, which is 1.715% return on the value of the property. Depreciation calculated on 100% condition on taxation value, the property being in 75% condition, and depreciation was calculated on \$1,246,053.00.

The Company operates 22 miles of street car lines in the City of Fort Smith and has lines extending to Van Buren and South Fort Smith—in all, operates 32 miles. For convenience in operation it is divided into seven lines, all of which traverse Garrison Avenue, the principal business street of the City. One of these lines begins on the north side of the City on the boulevard running to Van Buren, connects with the Van Buren line, thence runs south on Fifth Street to Garrison Avenue; then along Garrison Avenue to Little Rock Avenue; thence southeasterly along Little Rock Avenue, a distance of 6720 feet, to a point known as Humphrey's corner; thence south on Greenwood Avenue, a distance of 1620 feet, and then terminates near the Cemetery, known as Oak or City Cemetery.

Originally the line terminated at Humphrey's corner, but about 18 years ago it was extended from said corner south on Greenwood Avenue to its present terminus and was built on account of a baseball and amusement park there erected at that time. This amusement park was abandoned after two years and the Company has continued to operate on Greenwood Avenue ever since, and in 1910 reconstructed its line on the grade of the street as then laid out.

[fol. 3] Greenwood Avenue is a city street—a continuation within the City of the Greenwood Road, one of the principal highways into the city. Several roads and streets in the city are improved by the County, under an arrangement between the City and the County, and Greenwood Avenue is one of these.

The streets in the City are named numerically from the River East and Greenwood Avenue, if numbered, would be 27th Street.

A Blue Print Map of the City showing by red lines the track sought to be abandoned was introduced and is attached as "Exhibit A" to this Stipulation as part of the record.

Within the last few years there has been considerable building in the area south from Little Rock Avenue; most of these new residences are nearer Little Rock Avenue than Greenwood Avenue; some of them are nearer Greenwood Avenue and some of them are equidistant from the two. From Humphrey's corner south for the length of the line—1620 feet—Greenwood Avenue is well built up on the west side. There is only one house fronting on the east side, but for one to six blocks east there is a group of nice residences in what is known as the Fishback Place.

South of the terminus of the line there are no buildings for five blocks, Oak Cemetery being on the east side and vacant property on the west side. Five blocks south of the line is a group of five or six residences on Pelley Hill; these are nearer by 200 feet to Park Hill car line than the Greenwood Avenue line and a concrete street extends to the Park Hill line from them.

All of the property in the vicinity of the Greenwood Avenue extension and Park Hill Addition are within the city limits and served with water, lights and sewers. All of the people living in the group of houses in Fishback Place and on the Greenwood Avenue extension and in the two or three blocks on 25th and 26th Streets recently built up, are the owners of automobiles; most of these houses have servants. The automobiles at this place, and generally within the City, have greatly decreased street car patronage.

[fol. 4] When the Greenwood Avenue extension was built, located at the terminus of it was the principal Cemetery in the City, the others being the Catholic, the Jewish and the National, and it is still the largest Cemetery. Ten years ago the Forest Park Cemetery was opened in the north side of the town. The people who have used said Cemetery are those who would have used the Oak Cemetery had Forest Park not been opened.

In 1922 there were total interments in Ft. Smith of 500. 188 in Oak Cemetery; 127 in Forest Park.

Shortly before the bringing of this suit, the County Court decided to construct an asphalt pavement on Greenwood Avenue for a distance of more than a mile, beginning at the terminus of the street car line and building north.

Thereupon petitions for and against the removal of the street car line on Greenwood Avenue were presented to the City Commission, which did not act upon them.

Thereafter the Company petitioned for permission to abandon its line on Greenwood Avenue and set forth the expense of building a new line caused by the construction of said pavement and the loss in the operation of the present line.

It was from a denial of this petition and order of the City Commission to continue operation that this suit was brought. The testimony of the General Manager, the engineer and the Auditor of the Company show the following facts:

The ties and rails on the Greenwood Avenue extension were old and worn out, and the track laid on the surface of the street, which was unpaved, and the construction of a pavement required a reconstruction of the line to conform to the new grade, and the condition of the ties and rails was such that they could not be used in the reconstructed line and would not in any event have lasted more than six or eight months, and it was necessary for the Company to build an entirely new line from Humphrey's corner to the terminus. The cost of standard construction of this, conformable to the standard construction of the rest of the line would be \$11,031.00 after allowing salvage for the rails.

[fol. 5] A lighter line could be constructed for \$6,000.00, but the standard construction costing \$11,031.00 would be more economical. The net revenues of the Company (not deducting depreciation and using round numbers only) from 1905 to 1922, showed that 1911 was the highest, \$83,000.00; 1912 was the lowest, \$8,000.00; 1916 they were \$25,000.00; 1917, \$48,000.00; 1918, \$46,000.00; 1919, \$61,000.00; 1920, \$71,000.00, and 1921 was \$68,334.87 and 1922 was \$68,984.99.

The fare was five cents until 1919, when it was increased to seven cents, which still exists. Seven cents is as high as the fare can be made, without losing more from patronage than would be gained by the increase. The Company has put in a weekly pass to increase revenues and done everything possible to increase its revenues and operates as economically as possible.

The Company's statistics are kept by each line. The statistics of 1922 for each line reduced to a basis of average cash receipts per day per car is as follows, to-wit:

	Average cash receipts per day	Divided by average car miles per day	Average cash receipts per car mile per day
Eleventh .....	\$297.30	920.51	\$32.29
Little Rock .....	108.25	427.83	25.30
Grand .....	97.07	367.14	26.44
"E" Street .....	67.22	349.85	19.21
Park Hill .....	300.24	396.07	25.31
South Ft. Smith ...	54.19	205.06	26.42
Van Buren Local ..	16.08	138.44	11.61
Total all lines	\$740.35	2,805.21	\$26.39

The average daily receipts per month of the Little Rock Avenue line for 1922 were as follows, to-wit:

Jan., \$106.25; Feb., \$106.52; March, \$103.35; April, \$103.59; May, \$117.92; June, \$106.98; July, \$135.06; August, \$100.17; Sept., \$104.56; Oct., \$112.58; Nov., \$111.91; Dec., \$119.43; Average, \$108.25.

[fol. 6] The Company put men on the cars to make an actual count of the traffic on the Greenwood Avenue extension and of those who were Cemetery visitors for 25 days, making the count at different periods in the months of November and December, 1922, and January, 1923; this showed an average per day of 202 passengers and an average of 11 fares of visitors to the Cemetery; and that more passengers embarked and debarked at the end of the line than other places; those visiting the Cemetery used the cars both ways, which meant an average of  $5\frac{1}{2}$  people per day visiting the Cemetery.

In 1923 the average car mile expense was 19.23 cents. Using this as a basis for the expense on the Greenwood Avenue extension and allocating the revenues from the traffic on the Greenwood Avenue extension, which was done by taking its proportion to the average haul on the Little Rock Avenue line and it was found that the gross receipts applicable daily to this section were \$2.40 and the total daily expenses were \$8.25, which left a net loss in operating the Greenwood Avenue extension of \$5.85 per day, or a net loss of \$2,133.25 per year; this on operation alone. Depreciation and interest on the investment was not included in said calculation.

The present operation of the Company is to give for part of the

day a fifteen minute service on the Little Rock Avenue line, including the Greenwood Avenue extension, and the rest of the day for about one-half the time a twenty-minute service.

If the Greenwood Avenue extension were cut off, of the Little Rock Avenue line the Company would save one car in operating that line and have a 15-minute schedule for the entire day. The Company is now using four cars per day, whereas with that extension eliminated, with three cars per day, there would be a 15-minute service throughout the day. This change in operation would still preserve intact the line and the transfer system to Van Buren, and would reduce the cost of operation by \$3.56 per day, assuming that one-third of the traffic on Greenwood Avenue would be lost.

[fol. 7] The weather during the season when the tests were made was fair and there were no rains. Some witnesses testified that there were more visitors to the Cemetery in summer than in the fall and winter months, while others testified that fall months would be a fair average of the year.

On the subject of increased development in the Greenwood Avenue section of the town the testimony was as follows, on behalf of the appellees:

R. T. LITTLE testified he was a real estate agent and familiar with real estate conditions in this vicinity. He stated that there had been rapid growth in the last year or two with reference to building houses in that vicinity.

That a good deal of territory was left there upon which houses can be built, or are in progress of building. He has sold several lots which passed into the hands of prospective builders and knows of others being sold. These are in Reeder Addition, laying between Fishback Place and Oak Cemetery. He thinks the prospects are good for this vicinity to be developed in the next year or two, and that there has been as much development out Little Rock Avenue, not all the way out, but two or three blocks on each side of Little Rock Avenue, and extending out Greenwood Avenue in the last two or three years as any other part of town, and more than most places. He sold ten lots, one block north of the Cemetery beginning at the car line and running east two blocks, and one house had been built on them with prospects of others. Five houses will probably be built there this spring, as the parties bought the lots to build on them. There had been gratifying progress in that end of town, referring particularly to Little Rock car line and radiating back on 25th and 26th Streets. Two blocks in considered good service on a street car line, but three blocks is a little far away. Some of the territory along the Greenwood Avenue extension was until a short time ago undesirable for residence district because it was low but has recently been filled in.

[fol. 8] R. S. WALKER, also a real estate dealer, testified he was familiar with conditions on Greenwood Avenue extension, and says there has been considerable building in the last few years along that stretch on both sides and that there is a prospect of its continuing

through the next year, or so. There is a good deal of vacant territory there not built upon. There is not a great deal of such territory left in Fort Smith outside of the Park Hill Addition, which is largely vacant property and lies west of Greenwood Avenue. There has been no building from Dodson Avenue, (which is at the end of the extension of the line) south, except some houses on the corner, and the west side of Greenwood Avenue and nothing south of that until Pelly Hill is reached.

There is no development on the east side fronting on Greenwood Avenue, fronting the car line extension. One house there which was built about ten years ago; the other houses are situated further back. The people in that territory can be served by the Little Rock Avenue line. It is all within walking distance. East of the Fish-back Place there are no houses and no chance of development there.

Mrs. VINCENT testified she lives at the terminus of the street car line and has recently built some new houses there on the west side of Greenwood Avenue. She uses the street car some and uses automobiles the balance of the time. She has two tenants who use the cars regularly and the other side of the street has four families who use the cars regularly, and it is used every day by working people and she is of the opinion that it is used as much as any other line in Ft. Smith.

Mrs. McCANN testified that she lived on Pelly Hill, which is a settlement five blocks from the end of the street car line, containing about a half dozen houses; she says that the people living there use the Little Rock car line, rather than the Park Hill car line. She says that during the last two or three years the number of people that use the car line has increased and increased rapidly. She has not kept count of the passengers, but gives this as her general impression. She rides the cars once a day and uses an automobile the other time.

[fol. 9] VICTOR ANDERSON testified that he was manager of the Brick Plant located on the Greenwood Road about a mile from the terminus of the Little Rock Avenue car line and he visits the plant frequently. About 50% of his employees live around the plant and the others in town. Those that live in town use the car line. Nine-tenths of them go the Burke Road, which carries them into the Little Rock Avenue line at the Humphrey's corner and does not take them on the Greenwood Avenue extension. Some of the others go on the Park Hill car line and some go on the Greenwood Avenue extension; he employs more men in the summer than in the winter. He sometimes goes by Park Hill line and sometimes by the Little Rock Avenue line. This was all the testimony introduced.

Hill & Fitzhugh, Attorneys for Fort Smith Light & Traction Company. E. G. W. Dodd, Attorney for City of Fort Smith and the Commissioners Thereof.

[fol. 10] Pleas Before the Honorable John E. Tatum, Judge of the Twelfth Judicial Circuit of Arkansas, of which the Fort Smith District of Sebastian County, Arkansas, Forms a Component Part, had at the October, 1922, Term of the Sebastian Circuit Court for the Fort Smith District thereof.

[Title omitted]

Wherein judgment was rendered February 3rd, 1923.

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[fol. 11] IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

[Title omitted]

BILL OF COMPLAINT—Filed Nov. 15, 1922

Comes the plaintiff, Fort Smith Light & Traction Company, and alleges that it is a Corporation operating a Street car system in the City of Fort Smith, Arkansas, and alleges that the defendants, Fagan Bourland, M. J. Miller and M. F. Smith, are the City Commissioners of the City of Fort Smith, Arkansas.

That among the lines operating by the plaintiff in the City of Fort Smith is the line on Greenwood Avenue, sometimes called Greenwood Road, sometimes South Greenwood Avenue, a distance of 1,620 feet, extending from the intersection of Greenwood Avenue and Little Rock Road south to a point near the City Cemetery.

That said line of Greenwood Avenue has for many years been unprofitable and very little patronized and the service upon said line requires the curtailment of service within the City in order to serve the small population using it, and is thereby a detriment to the service as a whole.

That Greenwood Avenue is treated as a County Road by the City of Fort Smith and by the Fort Smith District of Sebastian County and is maintained and improved by the County, and not by the [fol. 12] City.

That the County Court of Sebastian County for the Fort Smith District has undertaken the paving of Greenwood Avenue, including said stretch of 1,620 feet, and is purposing to pave on either side of the tracks of the Street Car Company in said Street, and not pave between the tracks; and that the construction of such paving would leave the said stretch of road unsafe for travel, and if this plaintiff filled up the space between its tracks it would be a great expense to it without any corresponding benefit to its service.

That the plans of the County Court in constructing said pavement requires a re-adjustment of the grades of the present street car line, which will entail heavy expenses upon the plaintiff.

To properly maintain the said 1,620 feet so that it will be safe for travel under the construction now under way would cost the

plaintiff approximately \$11,031, and plaintiff would receive no corresponding benefit for said expenditure.

That pursuant to Section 7 of Act 124, approved February 15, 1921, amending Section 10 of Act 571 of 1919, the plaintiff on November 7, 1922, filed with the City Commission of the City of Fort Smith a petition to discontinue street car service and remove its tracks on Greenwood Avenue, which petition is as follows, to-wit:

[fol. 13] "To the Honorable City Commission of the City of Fort Smith:

Your petitioner, the Fort Smith Light & Traction Company, respectfully represents that it operates within the City of Fort Smith three Public utilities, operating each separately under one ownership and management, and keeps separate and distinct the expenses and income of each utility operated by it.

That it is operating within the City limits 22.853 miles of street cars and connected therewith lines to and in Van Buren, and to South Fort Smith, in all it is operating 30.188 miles of street cars radiating out of the City of Fort Smith.

That the street car service is unprofitable and the Company is making but little above the actual operating expense and is not making sufficient income to pay for depreciation and have a reasonable return on the value of its property.

That since its lines were constructed the use of automobiles has so curtailed the traffic of street cars that it is impossible for the petitioner to make a sufficient income to pay its operating expenses, depreciation and have a reasonable return upon its property.

That it pays such wages as are necessary in order to obtain competent employees, and the greater cost of labor and material in recent years have further absorbed the gross income of the Street [fol. 14] car department so that as a whole it is being operated at a loss.

That your Petitioner has a line extending easterly from Garrison Avenue on Little Rock Avenue to the junction of Little Rock Avenue, with Greenwood Avenue, and thence southerly on Greenwood Avenue a distance of 1,620 feet, to a point near the City Cemetery.

That the population served on Greenwood Avenue is small and most of the people living adjacent to it have automobiles and seldom, if ever, use the street cars. That the expense of operating the street cars and maintaining its tracks on Greenwood Avenue is considerable and greatly exceeds the amount of revenue received from passengers living adjacent to Greenwood Avenue, and all of those using the cars on Greenwood Avenue could have street car service without great inconvenience to them by taking the street cars on Little Rock Avenue, and by discontinuing the use of the extension on Greenwood Avenue, better service could and would be maintained for Little Rock Avenue.

Greenwood Avenue is considered and treated as a County Road and is improved by the County, and not by the City, nor an Improvement District, and most of the travel over it is to and from the country, and not from those living on adjacent property.

The County Court has contracted for the paving of Greenwood Avenue and the work is now about to be done, the purpose being to pave on both sides of the street car tracks now on Greenwood [fol. 15] Road; that the paving on each side of its tracks will require the Company to re-adjust its grades to the paving and to put that part of the road which lies between its tracks into such condition so that its line would be safe for travel. That such changes in its lines would be expensive, costing approximately, \$11,031.

That the Petitioner deems that its line on Greenwood Avenue is not necessary for the successful operation of its system and it is not necessary for the public convenience, and it is an unnecessary expense to it, and is a detriment to its system as a whole.

Your Petitioner further alleges that it is an undue burden on it to meet the expense required by the paving of said road, by the County of Sebastian, and that it is an undue burden to require it to meet the expense of operating beyond the junction of Little Rock Avenue and Greenwood Avenue.

Wherefore, the premises considered, your Petitioner prays this Honorable Commission to grant it permission to cease operating from the junction of Little Rock and Greenwood Avenue to the end of its present line on Greenwood Avenue, and that it have permission to take up its tracks now on Greenwood Avenue.

Respectfully Submitted, (Signed) D. C. Green, Vice President & Gen. Manager Fort Smith Light & Traction Company. Dated this 7th day of November, 1922, at Fort Smith, Arkansas."

That the said petition was presented for hearing—

[fol. 16]

"Resolution"

Whereas, the Fort Smith Light & Traction Company filed a petition on November 7, 1922, asking this Commission permission to take up their tracks on South Greenwood Avenue from the intersection of Little Rock and Greenwood Avenue to the end of its line at Oak Cemetery; and

Whereas, a similar petition had been filed by citizens and residents of the City of Fort Smith on August 4, 1922, praying that the City Commission order the Fort Smith Light & Traction Company to remove their tracks on Greenwood Avenue from Little Rock Avenue to Oak Cemetery. This petition was signed by twelve citizens; and,

Whereas, on August 14, 1922, a petition was filed with this Commission signed by 234 citizens of Fort Smith, praying that this Commission do not grant the petition for the removal of the tracks as it was a convenience to practically all the citizens of Fort Smith on account of the Oak Cemetery, as well as the residents in that immediate vicinity; and

Whereas, this Commission has found from their investigation that this track is demanded by the larger majority of the people of the City; and

Whereas, the Fort Smith Light & Traction Company being present by its Vice-President and General Manager, D. C. Green, and its attorneys, Hill & Fitzhugh, and said City of Fort Smith waiving any of its notices to which it may be entitled before proceeding with [fol. 17] the hearing of said petition, and,

Whereupon, the said Board of Commissioners proceeded to hear said petition and the evidence introduced in support of same, and being well and sufficiently advised of the premises, find each and every allegation in said petition against the said Fort Smith Light & Traction Company;

Therefore, be it resolved by the Board of Commissioners of the city of Fort Smith, Arkansas:

That the said Petition of the Fort Smith Light & Traction Company filed on the 7th day of November, 1922, in the office of the City Clerk of Fort Smith, be, and the same is, hereby, denied in each and every particular, and the said Fort Smith Light & Traction Company is denied the right to remove its track on South Greenwood Avenue from its intersection with Little Rock Avenue to Oak Cemetery, and the said Fort Smith Light & Traction Company is ordered to continue the maintenance of its tracks on South Greenwood Avenue and to operate its street car system and cars on said track as heretofore; and it is further ordered that a copy of this order and resolution be served upon the proper official of the Fort Smith Light & Traction Company.

Adopted this 10th day of November, 1922.

(Signed) Fagan Bourland, Mayor."

Wherefore, the plaintiff brings this complaint pursuant to Section 19 of said Act 124 of 1921, to have the Court review said order [fol. 18] herein set out as to its legality, validity, fairness and reasonableness as in said Section provided, and the plaintiff alleges:

First. That for the reasons stated in said petition heretofore copied herein the plaintiff is entitled to remove its tracks from said Greenwood Avenue and discontinue street car service thereon. The plaintiff prays that the Court hear its evidence sustaining the allegations of said petition herein adopted as allegations of this complaint, and to make an order permitting the plaintiff to discontinue its said street car service and remove its tracks from Greenwood Avenue.

Second. The plaintiff alleges that the order of the City Commission herein copied shows that the same is made on account of the fact that a petition for removal of the tracks was signed by twelve citizens and a petition against the removal of the tracks was signed by 234 citizens.

The plaintiff alleges that the said petitions for and against the removal were presented to the Commission long prior to its petition for removal, and that said petitions for and against said removal represented about two-thirds of one per cent of the population of the City of Fort Smith, and the plaintiff has not sought to have its petition determined by referendum and that a referendum repre-

senting less than one per cent of the population of the City is not a valid reason for said City Commission denying said petition.

[fol. 19] That said City Commission should have determined said issue solely by the law and facts.

Third. That the Order requiring the plaintiff to continue the maintenance of its tracks on Greenwood Road and operating its street cars thereon amounts to taking plaintiff's property without due process of law, contrary to the Constitution of Arkansas, and the Fourteenth Amendment to the Constitution of the United States, and is the taking of plaintiff's property for private use, without compensation, contrary to the provisions of the Constitution of Arkansas and of the United States.

Wherefore, the plaintiff prays this Honorable Court to make such Order as the City Commission should have made in the premises, and that the relief as prayed in the petition be granted, and that it be permitted to cease operating the street cars on said 1,620 feet on Greenwood Avenue, and that it be permitted to remove its tracks therefrom, and such other and further relief as the Court may find it entitled to receive.

Hill & Fitzhugh, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 20] IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

[Title omitted]

RESPONSE OF DEFENDANTS—Filed Feb. 2, 1923

Come now the defendants, Fagan Bourland, M. J. Miller and M. F. Smith, City Commissioners of the City of Fort Smith, Arkansas, and responding to the petition of the plaintiff, Fort Smith Light & Traction Company, state:

That they admit that the Fort Smith Light & Traction Company is a corporation, operating a street car system in the City of Fort Smith, Arkansas, and that the defendants, Fagan Bourland, M. J. Miller and M. F. Smith, are City Commissioners of the City of Fort Smith, Arkansas.

That they admit among the lines operated by the plaintiff in the City of Fort Smith is a line on Greenwood Avenue, sometimes called Greenwood Road and sometimes Greenwood Avenue, a distance of 1,620 feet, extending from the intersection of Greenwood Avenue with Little Rock Road south to a point near the City Cemetery.

That they deny that the line on Greenwood Avenue has for many years been unprofitable, and deny that said line has been very little patronized, and deny that the service upon said line requires the

[fol. 21] curtailment of service within the City in order to serve the *small* population using it, and deny that it is thereby a detriment to the service as a whole.

That they deny that Greenwood Avenue is treated as a county road by the City of Fort Smith and by the Fort Smith District of Sebastian County, and they deny that said street is maintained and improved by the County and not by the city, but they admit that said street has been paved by the County.

That they admit that the County Court of Sebastian County, for the Fort Smith District, has undertaken the paving of Greenwood Avenue, including said stretch of 1,620 feet, and is purposing to pave on either side of the tracks of the Street Car Company in said street and not pave between the tracks; that they admit that the construction of such paving will leave said stretch of road unsafe for travel, but deny that if this plaintiff fills up the space between its tracks it would be at a great expense to it without corresponding benefit to its service.

That they deny the plans of the County Court in constructing said paving require a re-adjustment of the grades of the present street car lines, and deny that such change in grade will entail heavy expense on the plaintiff.

That they deny to properly maintain said 1,620 feet so that it will be safe for travel under the construction now under way would cost the plaintiff approximately the sum of \$11,041.00 or any other [fol. 22] sum, and deny that plaintiff would receive no corresponding benefit for said expenditure.

That they admit that pursuant to Section 7 of Act 124 approved February 15th, 1921, amending Section 10 of Act 571 of 1919, the plaintiff, on November 7th, 1922, filed with the City Commission of the City of Fort Smith a petition to discontinue Street Car service and remove its tracks on Greenwood Avenue, and admit that said petition is as set out in plaintiff's complaint.

They admit that the said petition was presented for hearing on November 10th, 1922, and admit that the City Commission denied the same and ordered plaintiff to continue the maintenance of its tracks on Greenwood Avenue and to operate the street cars on tracks as heretofore, and admit that said order is as set out in plaintiff's complaint.

That they admit that the plaintiff brings this suit pursuant to Section 19 of Act 124 of 1921, to have the court review said order herein set out as to its legality, validity, fairness and reasonableness, as in said Section provided.

That they deny that for the reasons stated in said petition or for any other reason, the plaintiff is entitled to remove its tracks from Greenwood Avenue and discontinue street car service thereon. That they deny that the order of the City Commission copied in plaintiff's complaint shows that the same is made on account of the fact that the petition for removal of the tracks was signed by 12 citizens and the petition against the removal of the tracks was signed by 234 [fol. 23] citizens; but allege that said order was made from any other considerations which will hereinafter appear.

That they admit that the City Commission should have determined said issue solely by the laws and the facts, but allege that their action has been guided solely by the laws and the facts.

That they deny the order requiring the plaintiff to continue the maintenance of the tracks on Greenwood Road and operating its street cars thereon amounts to taking plaintiff's property without due process of law, contrary to the Statutes of Arkansas and the Fourteenth Amendment to the Constitution of the United States, and deny that it is the taking of the plaintiff's property for private use without compensation, contrary to the provisions of the Constitution of the United States.

Further answering, the defendants state that that portion of plaintiff's line sought to be removed serves a large number of persons in the City of Fort Smith, Arkansas, and is used by a large number of persons in coming to and going from their work, and that the terminus of said track is at or near the City Cemetery and near Oak Cemetery, which said Cemeteries are extensive and are visited often by relatives and friends of deceased persons buried therein, and that said track located on South Greenwood Avenue is used extensively by said friends and relatives in visiting said cemeteries and going to and from same.

That the portion of the City of Fort Smith served by said track [fol. 24] is in a growing and rapidly developing portion of the City of Fort Smith, and that although said line serves a large number of people, as above alleged, the number of people who will be served by said track in the future will become gradually larger, and that in so doing the need of the track sought to be removed will become more necessary.

That to remove said track would be unfair and unjust to a large number of people in the City of Fort Smith, Arkansas, who have bought property along, adjacent and in the vicinity of said tracks, knowing that said street car system was operating thereon and relying upon the use of the same as a material benefit to their property and convenience.

That Greenwood Avenue from its intersection with Little Rock Avenue has been widened to the South co-extensive to the track of the plaintiff laid along said Avenue, and that said widening was done pursuant to the suggestion of the Fort Smith Light & Traction Company that said street should be widened; that said widening has been done within the last three months.

That the slight change in the actual grade made necessary by the paving of Greenwood Avenue by the Fort Smith District of Sebastian County, will only leave plaintiff's tracks on Greenwood Avenue slightly below the established grade, and that for a small sum said tracks could be put upon the new grade.

That by the proper operation of its street car system the plaintiff Company can operate its Street Car line on Greenwood Avenue for [fol. 25] the distance of 1620 feet at a profit and receive for its service a just, fair and reasonable income for its expenditure in operating said trackage.

Wherefore, premises considered, the defendants pray that the order of the Board of Commissioners of the City of Fort Smith, Arkansas, be affirmed, and that the Fort Smith Light & Traction Company be enjoined from removing its trackage situated on South Greenwood Avenue in the City of Fort Smith, Arkansas, and that the Fort Smith Light & Traction Company be ordered to continue the operation of its street car system from and along its trackage situated on South Greenwood Avenue, and in order that this cause may be finally disposed of, defendants further pray that the Fort Smith Light & Traction Company be required to bring its tracks to the established grade of South Greenwood Avenue.

Fadjo Cravens, Daily & Woods, Attorneys for Defendants.

[File endorsement omitted.]

[fol. 26]

IN SEBASTIAN CIRCUIT COURT

[Title omitted]

#### RECORD ENTRY OF JUDGMENT

Now on this 3rd day of February, 1923, this cause coming on to be heard, and the Fort Smith Light & Traction Company being present by its attorneys, Hill & Fitzhugh, and the defendant Commissioners of the City of Fort Smith being present by their attorneys, Fadjo Cravens and Daily & Woods, and both sides having announced ready for trial, and it appearing to the court that on the 7th day of November, 1922, the Fort Smith Light & Traction Company filed its petition with the City Commission of the City of Fort Smith asking permission of said commission to take up their tracks on South Greenwood Avenue from the intersection of Little Rock and Greenwood Avenue to the end of the line at Oak Cemetery.

And it further appearing to the Court that said petition was by resolution of said City Commission of Fort Smith denied on the 10th day of November, 1922;

And it further appearing that within sixty days after the passage of said resolution by the City Commission of Fort Smith, the Fort Smith Light & Traction Company filed its petition or complaint [fol. 27] in this cause, and the City of Fort Smith having filed its answer to said complaint, and the Court having heard the evidence and being well and sufficiently advised in the premises, doth find:

1. That the valuation of the street railway property of the plaintiff presented by said plaintiff, for the purpose of this case, is fair, and, for the purpose of the case, the court finds its value to be \$934,500.00, and the Court finds that the plaintiff is making a net return on said valuation of 1.715%, and that it made a profit of \$16,027.74.

2. The Court finds that the Fort Smith Light & Traction Company is the assignee of the Fort Smith Railway Company, and that

it accepted the obligations of said Street Railway Company, as set out in Sec. 791, Digest of the City Ordinances of Fort Smith, 1906, which is as follows: "The tracks of the railroad shall be laid in accordance with the grades of the streets as now or as hereafter may be established, the city reserving the right to change or alter the grades of said streets or any or either of them or any part of either, whenever it sees fit to do so, and shall not be liable to said railway company for damages or losses that may be occasioned by such changes.

Sec. 792. That whenever a change of grade is made after due notice to the said street railway company, the said company shall at their own expense conform and adjust the tracks of the railway to such changed grades."

2. Sec. 834, same Digest, vested the franchise of the Fort Smith Railway Company in the Fort Smith Light & Traction Company, [fol. 28] with many other valuable concessions extending its franchise fifty years and giving it the right, in Sec. 836, to lay its tracks in Greenwood Avenue, and in Sec. 834 said: "That the future extensions on all streets and Avenues now occupied by said Fort Smith Light & Traction Company shall be graded in conformity with City grade from curb to curb by said Company." And the said Company accepted by written instrument filed with the City Council of Fort Smith, the said franchise, which granted it the privilege of building on the Greenwood Avenue and laid upon it the obligations of service and to maintain its tracks in conformity with the City grade.

3. That the City Commission of Fort Smith has laid no burden nor asked anything at the hands of the plaintiff company, except denying their right to abandon said service on the Greenwood Avenue.

4. That if the Corporation Commission Act of 1919 divested out of the City Commission of Fort Smith the right to enforce the franchise against plaintiff Company, it did not absolve it from the performance of its contractual obligation; that the Legislature can pass no law impairing the obligation contract.

5. That the Railroad Commission Act of 1921 repealing the Corporation Commission placed the City of Fort Smith and the Light & Traction Company practically in the same position they were before the passage of either Act.

6. That the order of the City Commission of Fort Smith denying the Light & Traction Company the privilege of taking up its tracks [fol. 29] and abandoning the service on Greenwood Avenue is not unreasonable and confiscatory. That the plaintiff could make the improvements it suggests would be necessary of \$11,031.00 out of 1.75% net profits and have the sum of \$4,996.74 profit left.

7. That the Greenwood Avenue is located in a settled portion of the City, which has paved streets, sewerage and electric lights and is fast growing in population.

It is therefore by the Court considered, ordered and adjudged that the order and resolution of the City Commission of the City of Fort Smith made and entered on the 10th day of November, 1922, be, and the same is hereby affirmed; that the Fort Smith Light & Traction Company be and it is hereby denied permission to take up its tracks on South Greenwood Avenue from the intersection of the Little Rock and Greenwood Avenue to the end of its line. That the City of Fort Smith, Arkansas, have and recover of and from Fort Smith Light & Traction Company all of its costs in this behalf laid out and expended, for which let execution issue, as in other cases.

The plaintiff, Fort Smith Light & Traction Company, severally excepted to each of the aforesaid findings of fact except the first, and to the rulings that the franchise terms still exist, and to the rulings on confiscation, and to the judgment of the Court, and prayed and was granted until February 9th, to file its motion for a new trial herein.

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[fol. 30] IN THE SEBASTIAN CIRCUIT COURT, FORT SMITH DISTRICT

[Title omitted]

MOTION FOR A NEW TRIAL—Filed Feb. 9, 1923

Comes the Fort Smith Light & Traction Company and moves the Court for a new trial herein, and for cause, says:

- (1) The Court erred in its second finding of fact.
- (2) The Court erred in its third finding of fact.

(3) The Court erred in its fourth finding that if the Corporation Commission Act of 1919 divested the City Commission of the right to enforce the franchises against the plaintiff Company, it did not absolve it from its performance of its contractual obligations and that the Legislature can pass no law impairing obligations of contracts and alleges that said Act referred to did not impair the obligations of contracts.

(4) The Court erred in the fifth finding that the Railroad Commission Act in 1921 repealing the Corporation Commission Act of 1919, placed the City of Fort Smith and the plaintiff Company in [fol. 31] practically the same position they were before the passage of either Act.

(5) The Court erred in its Sixth finding in holding that the order of the City Commission denying the plaintiff the privilege of taking up the track and abandoning the service on Greenwood Avenue, is not unreasonable and confiscatory.

(6) The Court erred further in the sixth finding in holding that a return of 1.715% on its property is not confiscatory.

(7) The Court erred in the seventh finding wherein it is held that Greenwood Avenue was fast growing in population.

(8) The Court erred in its judgment in denying the plaintiff the right to take up the track on South Greenwood Avenue, from the intersection of Little Rock and Greenwood Avenue to the end of its line.

(9) The Court erred in affirming the order of the City Commission wherein said plaintiff Company was ordered to continue the maintenance of its track on South Greenwood Avenue and to operate its said cars as heretofore.

(10) The judgment of the Court is without any substantial evidence to sustain it.

(11) The judgment of the Court is contrary to the law.

(12) The judgment of the Court is against the law and the evidence.

Hill & Fitzhugh, Attorneys for Plaintiff.

[File endorsement omitted.]

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[fol. 32] IN SEBASTIAN CIRCUIT COURT, OCTOBER TERM, 1922,  
FEBRUARY 9TH, 1923

[Title omitted]

Record Entry

ORDER OVERRULING MOTION FOR NEW TRIAL; GRANTING APPEAL,  
AND EXTENDING TIME

Comes on to be heard the motion for a new trial of the plaintiff, Fort Smith Light & Traction Company, and the Court doth overrule the same, to which ruling of the Court the plaintiff at the time excepted and prayed an appeal to the Supreme Court, which was granted, and prayed and was granted ninety (90) days in which to file its bill of exceptions.

[fol. 33] [File endorsement omitted.]

[fol. 34] STATE OF ARKANSAS, ss:

IN THE SUPREME COURT

[Title omitted]

MOTION AND ORDER ADVANCING CAUSE

Comes the appellant by its attorneys and presents a motion praying that this cause be advanced as of public interest and pursuant to Act 124, Acts 1921; and the appellees thereto consenting, and praying that the submission be set not earlier than June 4th, prox.,

It is ordered by the Court that the submission of this cause be advanced as prayed, and that it be set down for submission on June 4th, prox.

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[fol. 35] IN SUPREME COURT OF ARKANSAS, NOVEMBER TERM,  
1922, MAY 21, 1923

(Caption omitted)

ORDER SETTING CAUSE OF HEARING

This cause heretofore noted for oral argument, is now by the Court set down for such argument on June 4th, prox.

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IN SUPREME COURT OF THE STATE OF ARKANSAS, MAY TERM, 1923,  
JUNE 4, 1923

(Caption omitted)

ARGUMENT AND SUBMISSION

This cause being regularly called, come the parties by their attorneys, and this cause is submitted upon the transcript of the record and the briefs filed and upon oral argument, and is by the Court taken under advisement.

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[fol. 36] IN SUPREME COURT OF THE STATE OF ARKANSAS, MAY  
TERM, 1923, JUNE 18, 1923

(Caption omitted)

JUDGMENT

This cause came on to be heard upon the transcript of the record of the Circuit Court of Sebastian County, Fort Smith District, and

was argued by counsel, on consideration whereof, it is the opinion of the Court that there is no error in the proceedings and judgment of said Circuit Court in this cause.

It is therefore considered by the Court that the judgment of said Circuit Court in this cause rendered be, and the same is hereby, in all things, affirmed with costs.

It is further considered that said appellees recover of said appellant all their costs in this Court in this cause expended, and have execution thereof.

Opinion by the Chief Justice; Hart J. concurs;  
Wood, J. dissents; Humphreys, J., not participating.

[fol. 37] IN THE SUPREME COURT OF ARKANSAS, JUNE 18, 1923

[Title omitted]

#### OPINION

McCULLOCH, C. J.: Appellant is a corporation owning and operating a street car system in the City of Fort Smith, and this case involves the right of appellant to remove and abandon a portion of its track along one of the streets of the city contrary to the orders of the City Commissioners—the City of Fort Smith being operated under a commission form of government.

Appellant formerly operated under a franchise granted by the city government many years ago, but during the existence of the Corporation Commission, under the Act of April 1, 1919 (Crawford & Moses Digest, Sec. 1607 et seq.), it surrendered its charter and received what is designated as an "Indeterminate Permit" (Crawford & Moses Digest, Secs. 1655, 1656), and has continued to operate since that date under said permit.

The Act of February 15, 1921 (General Acts, 1921, p. 177) abolished the Corporation Commission and restored to municipal governments the control and supervision of street railroads and certain other public service utilities operating within municipalities.

On November 7, 1922, appellant presented a petition to the City Commission of Fort Smith, pursuant to Section 10 of the last statute referred to, for permission to abandon and remove its track [fol. 38] on Greenwood Avenue and discontinue service to that extent. There was a hearing before the City Commission, and permission to remove and abandon the track on Greenwood Avenue was denied, whereupon appellant filed its petition, or complaint, in the circuit court of Sebastian county, setting forth the grounds upon which it claimed the right to discontinue service and remove its track on Greenwood Avenue, and praying that the circuit court make an order such as should have been made by the City Commission on petition of appellant granting permission to appellant to cease operating the line on that street. Appellees—the City Commissioners—filed a response denying the allegations of ap-

pellant's complaint with respect to the grounds for abandonment of the track on Greenwood Avenue, and upon the issue thus framed there was a trial of the cause in the circuit court, which resulted in a judgment denying the relief prayed for by appellant and affirming the order of the Commission. An appeal has been prosecuted to this court.

Section 19 of the Act of February 15, 1921, *supra*, provides that any person, firm or corporation aggrieved by any order made by a municipal council or City Commission pursuant to the authority conferred under that statute "shall have the right to have said action on the part of such municipal council or City Commission reviewed as to its legality, validity, fairness and reasonableness by the circuit court of the county in which said municipal council or City Commission is located. \* \* \* Said review, however, by the said circuit court shall be made; provided, and upon condition [fol. 39] that the applicant files in said court or in the office of the clerk thereof within sixty (60) days after making of such order or ordinance or rate as to which the appeal is desired, its petition or complaint as in other cases setting out the order or ordinance or rate or other matter therein complained of, therein alleging according to the usual rules of pleading facts showing that the applicant is entitled to the relief therein prayed, upon which complaint summons shall be issued and served in the manner and for the time as in other circuit (court) cases; the said appeal in the circuit court shall proceed *de novo*.

In the brief of counsel for appellant attention is called to the fact that the complaint filed by appellant is applicable either in an independent action to prevent unlawful restraint by the City Commission or to a complaint, or petition, in the nature of appeal under the statute. No point of objection is made by counsel for appellees to this method of treatment of that subject, as either in a review by the methods prescribed by the statute or by an independent action, if the statute may be ignored and an independent action for relief instituted there is a hearing *de novo*, and the same facts are considered and like principles of law are applicable in either case in determining the right of appellant to discontinue service as claimed.

In the case of *St. Louis Southwestern Ry. Co. v. Stewart*, 150 Ark. 586, we decided that a similar provision in the Act of 1919, *supra*, afforded a judicial review *de novo* of the orders of the commission.

[fol. 40] The question presented for our decision on this appeal is whether the order of the commission refusing to grant permission to appellant to abandon the track and service in question is reasonable, or whether it is unreasonable and arbitrary and operates as a confiscation of appellant's property. The first question to be considered in this connection is the extent of and purpose for which we may consider the testimony in the case.

Section 21 of the Act of February 15, 1921, *supra*, provides for appeals to the Supreme Court from judgments of the circuit courts at the instance of the party aggrieved, and further provides that

"any finding of fact by the circuit court shall not be binding on the Supreme Court, but the Supreme Court may and shall review all the evidence and make such findings of fact and law as it may deem just, proper and equitable." We have not heretofore interpreted the latter part of the statute nor determined the question of its constitutionality, but, on the contrary, we have pretermitted a decision of that question in several cases which have arisen since this statute and the Act of 1919, *supra*, were enacted. *St. L. S. W. Ry. Co. v. Stewart*, *supra*; *Clear Creek Oil & Gas Co. v. Fort Smith Spelter Co.* 148 Ark. 260.

Counsel for appellees insist that the statute making it the duty of this court to review the evidence and determine its weight is unconstitutional. We deem it inappropriate to further postpone the [fol. 41] decision of this important question, and we proceed to pass upon the validity and constitutionality of the statute at this time. It is argued that the imposition of this duty upon the Supreme Court offends against the provision of the Constitution which limits the jurisdiction of this court to appellate and supervisory jurisdiction. Constitution, Art. VII, Sec. 4. The Constitution in plain terms declares that the Supreme Court shall exercise only appellate jurisdiction except in the single instance of issuing writs of quo warranto to circuit judges and chancellors and to officers and political corporations "when the question involved is the legal existence of such corporations." Constitution, Art. VII, Sec. 5. We have often in the decision of this court declared that it was beyond the power of the Legislature to confer original jurisdiction upon this court. The question therefore narrows to the inquiry whether this statute is an attempt to confer original jurisdiction and whether its observance by this court would come within the exercise of appellate jurisdiction as known and understood at the time of the adoption of the Constitution.

In *Harding v. State*, 94 Ark. 65, the following statement is found:

"The Legislature cannot add to or take from the jurisdiction vested in it by the Constitution. It cannot vest it with the jurisdiction to try capital offenses on appeal or writ of error as the circuit court. It is only for errors of that court that it has been or can be vested with jurisdiction to reverse or modify the judgments of such courts. Unless it appears that the circuit court has committed errors, this court can only affirm."

[fol. 42] That case is not, we think, decisive of the question now presented, for the point in that case was whether or not the Legislature had attempted to compel this court to hear capital cases *de novo*, and whether the Legislature could do so. That was a case falling within the provision of the Constitution guaranteeing the right of trial by jury and declaring that the trial court shall not charge upon the weight of the evidence. The present case falls within that class of cases in which there is no constitutional guaranty of trial by jury, not being a case which was triable by a jury at common law. *Govan*

v. Jackson, 32 Ark. 553; State v. Churchill, 48 Ark. 426; Wheat v. Smith, 50 Ark. 266; Drew County Timber Co. v. Board of Equalization, 124 Ark. 569; Missouri Pacific R. R. Co. v. Conway County Bridge Dist. 134 Ark. 292.

The Constitution itself affords no definition of the term "appellate jurisdiction" and does not in terms prescribe its extent and limit. We find nothing which would lead to the belief that at the time of the adoption of the Constitution the term "appellate jurisdiction" excluded the idea of an inquiry as to the weight of the evidence. In all our decisions on the subject it has been held that this court may in equity cases determine the weight of the evidence, and this rule has been established upon the theory that no constitutional guaranty is impaired by a review in this court to that extent. The rule that this court should not determine the weight of the evidence in cases at law is based primarily upon the fact that there is a constitutional [fol. 43] guaranty of trial of issues of fact by a jury, which would be encroached upon if this court undertook to determine the weight of the evidence, though the rule has been extended to law cases in which there is no constitutional guaranty. The court has merely adopted the rule, the same as has been done in other States, of leaving to the trial court the duty of determining the facts, and we see no reason why the Legislature cannot establish that rule of procedure in this court in cases where there is no guaranty of trial by jury. Such is the view of the Supreme Court of Wisconsin in construing a similar statute under constitutional provisions almost identical with the provisions of our own Constitution. *Klein v. Valerius*, 87 Wis. 54, 22 L. R. A. 609. The Wisconsin statute provided in language very similar to that used in the statute now before us, that it should be the duty of the appellate court "to examine and review the evidence \* \* \* and give judgment according to the right of the case, regardless of the decision upon questions of fact or law made by the court below according to law and equity."

The Supreme Court of Wisconsin in the case referred to above held that the statute was applicable to be tried by the court below and not by a jury, but that the statute was void so far as it attempted to impose upon the appellate court the duty of determining the weight of the evidence in a case decided by a jury. In disposing of the matter, the court said:

"This court has always sought to review 'all questions of law or [fol. 44] fact' properly presented for review by the record upon appeal or writ of error. It has, moreover, always sought 'to examine and review the evidence when the same is preserved by a bill of exceptions,' in a manner authorizing and calling for such examination and review, according to the established rules of 'law and equity.' Accordingly, this court has never felt bound by the findings of the trial court regardless of the weight of the evidence, in an equitable action, or an action tried by the court without a jury \* \* \*."

The court then quoted the provision of the Constitution with reference to the jurisdiction being only appellate, and then said:

"The duties of this court are confined almost wholly to an exercise of its appellate jurisdiction. The Constitution provides that 'the right of trial by jury shall remain inviolate; and shall extend to all cases at law.' \* \* \* This court has uniformly held that this language imports that such right must remain as it existed when the Constitution was adopted."

Similar statutes have been upheld in other States and we find no decisions to the contrary. *Tony v. State*, 144 Ala. 87; *Parkison v. Thompson*, 164 Ind. 609; *Christianson v. Farmers Warehouse Assn.*, 5 N. D. 436; 2 R. C. L. pp. 193, 202.

The North Dakota case and the Indiana case cited above each furnish an interesting discussion of this question and fully sustain the conclusions we now reach on the subject. In the North Dakota case, the court said:

"Appellate jurisdiction cannot create a cause. It must be first [fol. 45] created and adjudicated by another judicial tribunal. Those facts existing, the appellate court may exercise its jurisdiction in any form the Legislature may prescribe. The Legislature may require the appellate court to review the facts, and render final judgment. If, in doing so, it exercise some of the same functions as a court of original jurisdiction, we answer that there is neither constitutional nor legal reason why it should not."

To this statement we must add the qualifying language that there is no reason why the Legislature cannot authorize such proceedings in an appellate court, unless it conflicts with some other provision of the Constitution, and we agree with the Wisconsin court in the case cited, *supra*, that the provision with reference to guaranty of trial by jury is a limitation upon the exercise of appellate jurisdiction.

Under the rule of law declared by this statute we are called on to enquire into the weight of the evidence as in equity cases. This is for the purpose of determining whether or not the judgment of the court is against the preponderance of the testimony. The case is not tried anew as if no judgment had been rendered by the lower court, for on this appeal the burden is upon the appellant to show that the judgment is erroneous, and unless it is against the preponderance of the evidence we cannot say that it is erroneous. We proceed, then, to an inquiry as to whether or not the evidence in the present case preponderates against the finding and judgment of the court.

[fol. 46] The part of appellant's track sought to be removed and discontinued runs a distance of 1,620 feet along Greenwood Avenue from its intersection with Little Rock Avenue. Appellant has about 22 miles of trackage in the City of Fort Smith, and it is divided into sections for operating purposes. The line running out on Greenwood Avenue is known as the Little Rock Avenue line and begins at the car barns on Midland Boulevard, running thence along certain streets to Garrison Avenue, thence out Garrison Avenue a distance of about eight blocks, thence out Little Rock Avenue a distance of 6,720 feet to the intersection of Greenwood Avenue, and thence turns into Greenwood Avenue and runs a distance of 1,620 feet. The line

does not run any farther out on Little Rock Avenue, but stops at the intersection of Greenwood Avenue, or a point referred to as the Humphrey's Corner. The Greenwood Avenue line was built about twenty years ago and it terminates at a public cemetery known as the City Cemetery. At the time of the extension of the track out Greenwood Avenue there was a baseball park opposite the City Cemetery, and the main purpose in extending the line was to reach the ball park. The park was abandoned after two or three years, but the street car line has been continued from that time until the present, a period of about seventeen years.

Greenwood Avenue is a portion of a public highway between the City of Fort Smith and the town of Greenwood, and the county court determined to pave it as a hard-surfaced road, both inside and out of [fol. 47] the city. The paving of the street requires a slight change in the grade of the street car track so as to conform to the surface of the paved street. The track along the avenue was repaired or rebuilt about the year 1910, and is now worn out to the extent that it will have to be rebuilt. It is shown by the undisputed evidence that it will cost \$11,000 to rebuild the line on Greenwood Avenue with standard material, such as is used for the remainder of appellant's trackage in Fort Smith. It is also shown, and the trial court found, that the valuation of appellant's physical properties represented by the whole of the street railway line amounted to \$934,540, and that the net profits amounted to \$16,127.74, which is 1.715 per centum net profits on its valuation. Appellant shows in the evidence its method of arriving at the distribution of its operating expenses on the various lines and shows that it costs about \$8.25 per day to operate cars on that portion of the track extending out on Greenwood Avenue, and that the net earnings on that part of the line only amount to \$2.14 per day, leaving a net loss per day of \$5.85 in operating on the Greenwood Avenue line.

Appellant undertook to furnish counts as tests at certain periods, of the number of persons embarking and debarking on and from that line during certain periods in three months, and it arrived at the cost of operating cars on that section of the line by apportionment in accordance with the total distance of the line. It is unnecessary here to repeat at length the method by which appellant's witness arrived at this result. Suffice it to say that it was competent [fol. 48] testimony and may be treated as establishing the proportion of expense of operating this additional line.

There is a conflict, however, in the testimony as to the amount of patronage on this line and as to the probable increase of such patronage. Appellant undertook to show by count the number of people who visited the cemetery per day, but appellees introduced other witnesses, who lived in the neighborhood and who testified that the patronage by travel to the cemetery during the summer months was greater than during the autumn and winter months, when appellant's tests were made. The evidence shows that there are only two houses fronting on the east side of Greenwood Avenue, but that the west side of the avenue is well built up; that immediately beyond the terminous of the line there are five blocks where there are no houses

fronting on the avenue, the cemetery being on one side and vacant lots on the other, but there is a collection of houses five blocks beyond the terminous. There are houses on parallel streets within easy walking distance of the car line, and the locality, as a whole, is fairly well built up as a residential section. There is testimony showing that much of this locality is reasonably accessible to the car line on Little Rock Avenue.

Appellant also introduced testimony tending to show that most of the people who live out there own automobiles. The testimony shows that the cemetery is still kept up and that there are, on an average, about thirty burials per month. Other cemeteries have been established in other localities in the city since the line was built.

[fol. 49] Appellees introduced witnesses who testified that the locality to which this line furnishes service had good prospects for considerable development, that it is a residential section, and that a good many sales of lots were being made. The testimony of these witnesses was sufficient to show that there would be a substantial increase in the patronage on this line in the future.

Upon consideration of all the testimony, we are of the opinion that it is sufficient to support a finding that the patronage of this line will increase, not diminish. It is not an unsupported promise or anticipation of the future to say that the locality to which this line furnishes service will be built up in the near future with residences and that the patronage will be very considerably increased. Of course, the question of the effect of the use of automobiles upon street car service is, to some extent, problematical. This is true as to any portion of appellant's line, or the line of any other street railroad.

The question of just and reasonable compensation, or, on the other hand, of confiscation, must be considered in determining appellant's right to discontinue operation on its line. No order of the governing body of a city which results in confiscation of property within the meaning of the law can be upheld as a valid regulation. It does not follow, however, that a public utility after having occupied a field or territory by permission of public authority can restrict [fol. 50] its sphere of operation to places of its own choosing as against the convenience of the public, or that it can withdraw after having once established it in a given portion of a territory. The rule of justice is, we think, very aptly stated by the Supreme Court of the United States in the case of *N. Y. & Q. Gas Co. v. McCall*, 245 U. S. 345, as follows:

"Corporations which devote their property to a public use may not pick and choose, serving only the portions of the territory covered by their franchises which it is presently profitable for them to serve, and restricting the development of the remaining portions by leaving their inhabitants in discomfort without the service which they alone can render. To correct this disposition to serve where it is profitable and to neglect where it is not is one of the important purposes for which these administrative commissions, with large

powers, were called into existence, with an organization and with duties which peculiarly fit them for dealing with problems such as this case presents \* \* \*."

That language is peculiarly applicable to a case where, as in this instance, the public utility has actually occupied a given portion of its territory and furnished service for a number of years and then attempts to withdraw it.

There is evidence, as above stated, that appellant extended its line on Greenwood Avenue primarily for the purpose of furnishing service to patrons traveling to and from the baseball park, but the park was abandoned seventeen years ago and appellant has continued the service, and actually rebuilt the line in the year 1910. [fol. 51] There is not the slightest proof in the record that there has ever been any decrease in the patronage on that line, and even though appellant established the line to meet a particular character of patronage, it did not withdraw it when that particular patronage ceased, but has furnished service to the inhabitants of that locality for the past seventeen years. There is much reason for a distinction between the construction of a line as an original project and the right to withdraw it after once constructed and put into operation.

Conceding that there is no absolute obligation on the part of the utility company to continue an unprofitable line, the fact that people have been induced by the establishment of the line to build homes in that locality is a necessary part of the consideration in determining whether or not it is proper for the company to be permitted to withdraw from that part of the service. The question of expenses and profits are not the only things to be considered. Appellant has the right, under its present status as the holder of an indeterminate permit, to withdraw altogether from the territory, but as long as it occupies the field it should not be permitted in the language of the Supreme Court of the United States, to "pick and choose," taking the part which is profitable and withdrawing from that portion which is unprofitable. The project must, in other words, be considered as a whole in determining whether a given rule or requirement be confiscatory. *Atl. Coast Line R. R. v. N. C. Corp.* Comm. 206 U. S. 1; *Mo. Pac. R. R. Co. v. Kansas*, 216 U. S. 262; *Puget Sound Traction [fol. 52] L. & P. Co. v. Reynolds*, 244 U. S. 574; *Miss. R. R. Comm. v. M. & — R. R. Co.* 244 U. S. 388; *Milwaukee Elec. R. & L. Co. v. State*, 252 U. S. 476; *Brooks-Seanlon Co. v. Ry. Comm. of La.* 251 U. S. 393.

The undisputed evidence in this case shows that appellant's net earnings on its railway lines are less than two per centum on the valuation, and it must be conceded that this is not a fair return upon the investment. Any reduction of rates which would result in a reduction of net profits would obviously be confiscatory in its effect, but there is no proposal on the part of appellant to increase the rate; on the contrary, it has been freely stated in the argument that it would not be deemed advisable to increase the rate of fares above the present rate of seven cents per passengr. We are not dealing now with the question of rates. Appellant could not be compelled to

maintain its service at a confiscatory rate, but, as before stated, this low rate results from the operation of the utility as a whole, and the withdrawal of service on Greenwood Avenue would not materially affect the net revenues as a whole. The cost of rebuilding and maintaining this line is almost trifling in comparison with the value of the whole system, and the cost of its operation. Therefore, it is but simple justice to the inhabitants of this locality to say that because appellant is willing to operate its entire system at a grossly inadequate compensation, it cannot deny the same service to a locality where the line was established many years ago. The inhabitants and owners of property in this locality are just as much entitled to service as others similarly situated in the city who have a line already established.

It is not unworthy of notice also that the Greenwood Avenue line is not merely a lateral running off the Little Rock Avenue line, but it is a part of that line. The Little Rock Avenue line does not extend out on that avenue any farther than the point of its intersection with Greenwood Avenue at the Humphrey's Corner. Therefore, the abandonment of this line will be a mere curtailment or withdrawal of a part of the main line, and if appellant can cut off and abandon this much of the line, there is no reason why it should not continue in its progress of abandonment until it contracted its line to such a point where it would reap such profits as it desired in its operation.

Our conclusion, or at least the conclusion of a majority of the court, is that the circuit court was correct in refusing to set aside the order of the City Commission.

The judgment is, therefore, affirmed.

Justices Wood and Hart dissent on the ground that the judgment should be reversed on the evidence.

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[fol. 54] IN SUPREME COURT OF ARKANSAS, MAY TERM, 1923,  
JULY 2, 1923

(Caption omitted)

#### ORDER EXTENDING TIME

The appellant, by its attorneys, having filed a petition for rehearing within the time allowed by law, now prays for two weeks' time in which to prepare and file a supporting brief, and said prayer for time is by the Court granted.

IN SUPREME COURT OF ARKANSAS, MAY TERM, 1923, SEPTEMBER 17,  
1923

(Caption omitted)

ORDER GRANTING LEAVE TO ARGUE PETITION FOR REHEARING  
ORALLY

On this day comes the appellant by its attorneys and presents a motion praying that it may be heard in oral argument in support of the petition for rehearing.

And it appearing that the case was decided by a divided court and the cause was argued orally before submission at appellant's request, and that one of the Associate Justices did not participate therein, and that he will now participate in deciding the case, leave is granted said appellant to argue the case orally in support of its said petition for rehearing, and the same is passed until September 24th, inst., for that purpose.

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[fol. 55] IN THE SUPREME COURT OF ARKANSAS, MAY TERM, 1923,  
SEPTEMBER 24, 1923

(Caption omitted)

ARGUMENT AND SUBMISSION OF PETITION FOR REHEARING

The petition for rehearing filed herein being called, the same was argued by counsel and submitted and was by the Court taken under advisement.

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[fol. 56] IN THE SUPREME COURT OF ARKANSAS

No. 7998

[Title omitted]

MOTION FOR REHEARING—Filed June 29, 1923

Comes the appellant and alleges the Court has erred in the following particulars:

(1) The Court mistakenly assumed that the valuation of the entire property of the Company found by the lower court, to-wit: \$934,540.00, and the net profits made thereon for the year 1922, \$16,127.74, which produces a return of 1.715% represented the Little Rock Avenue line, instead of the system as a whole.

(2) The Court mistakenly assumed that the cost of rebuilding and maintaining this line is almost trifling in comparison with the value of the whole line and the cost of its operation.

(3) The Court mistakenly assumed that there was a finding of the lower court that the patronage of this line was increasing, not diminishing.

(4) The Court erred in finding that the evidence showed there will be a substantial increase in the patronage of this line in the future and that the locality which this line serves had good prospects for considerable development.

(5) The Court erred in ruling that there was a distinction between the construction of a line as an original project and the right to withdraw it after once constructed and put into operation.

Wherefore, appellant prays for a rehearing and that on further consideration this cause be reversed.

Hill & Fitzhugh, Attorneys for Appellant.

Affidavit of Joseph M. Hill to above paper omitted in printing.

[File endorsement omitted.]

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[fol. 58] IN SUPREME COURT OF ARKANSAS, MAY TERM, 1923,  
OCTOBER 8, 1923

[Caption omitted]

# ORDER DENYING PETITION FOR REHEARING AND AMENDING OPINION

Being fully advised, the petition for rehearing filed herein is by the Court overruled; and the Court amends the opinion heretofore handed down.

Wood & Hart, J. J. dissent.

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[fol. 59] STATE OF ARKANSAS, ss:

SUPREME COURT

## CLERK'S CERTIFICATE

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings, as called for in the stipulation attached hereto, in the case of Fort Smith Light & Traction Company, Appellant, vs. Fagan Bourland, Mayor, et al., Appellees, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In Testimony whereof, I have hereunto set my hand — affixed the seal of said court at my office, in Little Rock, Arkansas, this November 6th, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of Supreme Court of Arkansas.)

[fol. 60] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS—Filed Oct. 29, 1923

Now comes the Fort Smith Light & Traction Company, Petitioner herein, and plaintiff in error, by its attorneys, Joseph M. Hill and Henry L. Fitzhugh, and in connection with its petition for writ of error makes and declares the following assignment of errors, to-wit:

First: The Court erred in not holding that the order of the City Commission of the City of Fort Smith, Arkansas, of date November 10, 1922, denying the petition of the Fort Smith Light & Traction Company to remove its street car tracks from South Greenwood Avenue, and ordering the said Company to continue the maintenance of its tracks on South Greenwood Avenue, and to operate its street car system and cars on said tracks as heretofore, was void because it deprived said Fort Smith Light & Traction Company of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

Second. The Court erred in not holding the aforesaid order complained of in the complaint of the said Fort Smith Light & Traction Company was void, because it amounted to taking private property of said Fort Smith Light & Traction Company for public use without compensation. By reason whereof this Petitioner and plaintiff in error prays the decision of the Supreme Court of Arkansas may be reversed and justice done. Done this, the 29th day of October, 1923.

Jos. M. Hill, Menry L. Fitzhugh, Attorneys for Petitioner  
and Plaintiff in Error.

[File endorsement omitted.]

[fol. 61] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed  
Oct. 29, 1923

Comes the Fort Smith Light & Traction Company, the appellant in an action lately pending in this court, wherein it was the appellant and Fagan Bourland, M. J. Miller and M. F. Smith, City Commissioners of the City of Fort Smith, were the appellees, and represent that on November 10, 1922, the City Commission of the City of Fort Smith entered an order denying a petition of this petitioner to remove its tracks from South Greenwood Avenue, in the City of

Fort Smith, Arkansas, and said Commission by resolution ordered this Petitioner to continue the maintenance of its tracks on South Greenwood Avenue and operate its street car system and cars on said tracks as heretofore; and that your Petitioner within sixty days after the passage of the said resolution filed its complaint in the Sebastian Circuit Court for the Fort Smith District, the court having jurisdiction to review said order and resolution of the City Commission, wherein your Petitioner alleged that said order and resolution of the City Commission amounted to taking your Petitioner's property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States, and that it amounted to taking the private property of your Petitioner for public use without compensation.

That the said Sebastian Circuit Court, Fort Smith District, on the 3rd day of February, 1923, entered a judgment affirming the said order and resolution of the City Commission of the City of Fort Smith and your Petitioner took an appeal therefrom to this Honorable Court, and this Court after affirming the said decision by an equally divided Court re-heard the same, and on the 5th day of October, 1923, affirmed the decision of the Sebastian Circuit Court for the Fort Smith District.

Your Petitioner alleges that the decision of this Court was against the contentions set up by your Petitioner in the Circuit Court and in this Court, and denied it the right and privilege which it specially set up and claimed under the Constitution of the United States, and held valid the authority exercised by the City Commission of the City of Fort Smith through said order and said resolution of November 10, 1922, which order and resolution your petitioner contends deprived it of its property without due process of law and amounted to taking its private property for public use without compensation.

Your Petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors filed herewith.

Wherefore, your petitioner prays that a writ of error may be issued in this cause from the Supreme Court of the United States to the Supreme Court of Arkansas for the correction of errors complained of, and that a transcript of all of the record, proceedings and papers in this cause, duly authenticated by the clerk of the Supreme Court, may be sent to the Supreme Court of the United States as provided by law.

Dated this 20th day of October, 1923.

Jos. M. Hill, Henry L. Fitzhugh, Attorneys for Petitioner  
and Plaintiff in Error.

Upon the consideration of the above and foregoing petition for writ of error it is ordered that said writ of error issue upon the execution by the plaintiff in error, Ft. Smith Light & Traction Company, of a bond in the sum of \$1,000.00, said bond to be conditioned as prescribed by the law and practice in such cases.

Given under my hand and seal this, the 29th day of October, 1923.  
 E. A. McCulloch, Chief Justice of the Supreme Court of  
 Arkansas.

[File endorsement omitted.]

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[fol. 63] BOND ON WRIT OF ERROR FOR \$1,000.00—Approved and  
 filed Oct. 29, 1923; omitted in printing

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[fol. 64] WRIT OF ERROR—Filed Oct. 29, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable  
 Chief Justice of the Supreme Court of the State of Arkansas,  
 Greeting:

Because in the record and proceedings and in the affirmance of a  
 judgment of the Sebastian Circuit Court, for the Fort Smith Dis-  
 trict, as also in the rendition of the judgment of a plea which is  
 in the Supreme Court of Arkansas before you, being the highest  
 Court of law or equity, of said State in which a decision could be  
 had in the suit between the Fort Smith Light & Traction Company,  
 Appellant, and Fagan Bourland, M. J. Miller and M. F. Smith,  
 City Commissioners of the City of Fort Smith, Arkansas, appellees,  
 wherein was drawn in question the validity of an order and resolu-  
 tion of the City Commission of the City of Fort Smith, Arkansas, the  
 same being an authority exercised under said State, on the ground  
 of said resolution and authority exercised under it being repugnant  
 to the Constitution of the United States and the decision was in  
 favor of the validity of the order and resolution of the said City  
 Commission and the Act of the State thereunder, and wherein a  
 right, title, privilege and immunity was claimed by the said Fort  
 Smith Light & Traction Company under the Constitution of the  
 United States, and the decision was against the right, title, privilege  
 and immunity especially set up and claimed under said Constitu-  
 tion of the City Commission of the City of Fort Smith, Arkansas, the  
 Fort Smith Light & Traction Company as by its complaint it ap-  
 pears.

We being willing that error, if any hath been, should be duly cor-  
 rected and full and speedy justice done to the party aforesaid in this  
 behalf, do command you, if judgment be therein given, that then  
 under your seal, distinctly and openly, you send the record and pro-  
 ceedings aforesaid, with all things concerning the same, to the Su-  
 [fol. 65] preme Court of the United States, together with this writ,  
 so that you have the same in the said Supreme Court at Washing-  
 ton, within 30 days from the date thereof, that the record and pro-

ceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, this, the 29th day of October, 1923.

Sid. B. Redding, Clerk of the United States District Court for the Eastern District of Arkansas, By W. P. Feild, D. C.  
(Seal of District Court, Western Division, U. S. A.)

Allowed by: E. A. McCulloch, Chief Justice of the Supreme Court of Arkansas.

[File endorsement omitted.]

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[fol. 66] STATE OF ARKANSAS, ss:

SUPREME COURT

CERTIFICATE OF LODGMENT

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on October 29, 1923, in the matter of Fort Smith Light & Traction Company, versus Fagan Bourland, Mayor, et al.:

1. The original bond of which a copy is herein set forth.
2. Copies of the writ of error, as herein set forth—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 6th day of November, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

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[fol. 67] IN THE SUPREME COURT OF THE STATE OF ARKANSAS

[Title omitted]

CITATION—Filed Oct. 29, 1923; omitted in printing

We acknowledge receipt of copy of attached citation, and waive formal service thereof.

Given under our hands this 29th day of October, 1923.

E. G. W. Dodd, Atty. for Fagan Bourland, M. J. Miller, M.  
F. Smith.

[File endorsement omitted.]

[fol. 68] UNITED STATES OF AMERICA, ss:

SUPREME COURT OF ARKANSAS

RETURN TO WRIT OF ERROR

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings, as called for in the stipulation hereto attached, in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this November, 1923.

W. P. Sadler, Clerk Supreme Court of Arkansas. (Seal of the Supreme Court of Arkansas.)

Costs of suit omitted in printing.

(Here follows Exhibit A to Stipulation, map of the city of Fort Smith, Ark., marked side folio page 69)

Endorsed on cover: File No. 29,956. Arkansas Supreme Court. Term No. 646. Fort Smith Light & Traction Company, plaintiff in error, vs. Fagan Bourland, M. J. Miller, and M. F. Smith, city commissioners of the city of Fort Smith, Arkansas. Filed November 12th, 1923. File No. 29,956.

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